Supreme Court, U. S.
FILED
FEB 8 1978
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1977

No. 77-979

Appalachian Power Company,
Appellant,

v.

The Public Service Commission of West Virginia,
Appellee.

ON APPEAL FROM THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

MOTION TO DISMISS OR AFFIRM

Arnold O. Weiford, *General Counsel*
Clement R. Bassett
George Zivkovich
C. Terry Owen
Attorneys for Appellee

E-214 State Capitol Building
Charleston, West Virginia 25305

February 8, 1978

TABLE OF CONTENTS

	Page
Motion to Dismiss or Affirm	1
Nature of the Case and Proceedings Below	2
Argument	4
Introduction	4
I. Failure to Attain a Certain "coverage" Is Not "confiscation" in the Constitutional Sense: and Therefore is not a Violation of the Fifth and Fourteenth Amendments of the United States Constitution	6
II. The West Virginia Public Service Commission Did Consider Appalachian's Capital Attraction Requirements in its Orders of May 6, 1977 and July 29, 1977	19
III. "Coverage" Requirements in Public Utility Ratemaking	22
A. Why the Use of a "Coverage" Requirement as a "Critical Test" of Confiscatory Rates in Public Utility Ratemaking is Unsound, Unreliable, and Just Plain Wrong	22
B. Comments on Exactly How 2.0 Times Coverage Affects Equity Levels	32
IV. As a Matter of Fact, What is Appalachian's First Mortgage Bond "Coverage" in 1977?	35
V. Some Comments on Appalachian's Credit Standing	38
VI. The Commission Orders Do Not Unconstitutionally burden or Interfere With Interstate Commerce	40
Argument — Summary	48
Conclusion	51

TABLE OF AUTHORITIES

Cases: **Page**

Appalachian Power Company v. *Commonwealth of Virginia*, Supreme Court of Virginia, 221 S.E. 2d 872 (1976) 12

Bluefield Water Works & Improvement Company v. *Public Service Commission*, 262 U.S. 679, 43 S.Ct. 675, 67 L.Ed. 1176 (1923) 7, 14

Board of Public Utility Commissioners v. *New York Telephone Co.* 271 U.S. 23, 46 S.Ct. 363, 70 L.Ed. 808 (1926) 7

Columbia Gas of West Virginia, Inc., Case No. 8807, Public Service Commission of West Virginia, (June 14, 1977) (Unreported) 13

Denver Union Stock Yard Co. v. *United States*, 304 U.S. 470, 58 S.Ct. 990, 82 L.Ed. 1469 (1938) 7

Federal Power Commission v. *Hope Natural Gas Co.* 320 U.S. 591, 64 S.Ct. 281, 88 L.Ed. 333 (1944). 10, 14, 15, 17, 18, 45

Federal Power Commission v. *Texaco, Inc.* 417 U.S. 380, 94 S.Ct. 2315, 41 L.Ed. 2d 141 (1974). 14

Kansas-Nebraska Natural Gas Co. v. *The City of St. Edward*, 134 F. Supp. 809, 825 (1955) 42

Mississippi Power Company v. *Mississippi P.S.C.*, 291 So. 2d 541 (1974). 18

Mitchell Coal & Coke Co. v. *Pennsylvania Railroad Co.* 230 U.S. 247, 33 S.Ct. 916, 57 L.Ed. 1472 (1913). . 9

McCardle v. *Indianapolis Water Co.*, 272 U.S. 400, 47 S.Ct. 144, 71 L.Ed. 316 (1927) 8

Mobil Oil Corp. v. *Federal Power Commission*, 417 U.S. 283, 94 S.Ct. 2328, 41 L.Ed. 2d 72 (1974). 10

Munn v. *Illinois* 94 U.S. 113, 24 L.Ed. 77 (1876) 10

Pacific Gas & Electric Co. v. *San Francisco* 265 U.S. 403, 44 S.Ct. 537, 68 L.Ed. 1075 (1924) 9

Permian Basin Area Rate Cases, 390 U.S. 747, 88 S.Ct. 1344, 20 L.Ed. 2d 312 (1968) 14

Pittsburgh & West Virginia Glass Co. v. *The Public Service Commission of West Virginia*, 101 W.Va. 63, 132 S.E. 497 (1926) 8

Preston County Light and Power Company v. *Public Service Commission of West Virginia* (Southern District West Virginia), 297 F.Supp. 759, 763 (1969).. . 41

San Diego Land & Town Co. v. *National City* 174 U.S. 739, 19 S.Ct. 804, 43 L.Ed. 1154 (1899) 7, 9

Southern Pacific Company v. *Arizona*, 325 U.S. 761 (1944) 46, 47

United Fuel Gas Co. v. *Railroad Commission*, 278 U.S. 300, 49 S.Ct. 150, 73 L.Ed. 390, (1929) 38

United Railways & Electric Co. v. *West*, 280 U.S. 234, 50 S.Ct. 123, 74 L.Ed. 390 (1930). 10

Washington Water Power Company, Idaho Public Utilities Commission, 17 PUR 4th 70 (1976) 13

Willcox v. *Consolidated Gas Co.*, 212 U.S. 19, 29 S.Ct. 192, 53 L.Ed. 382 (1909) 11

Zucker v. *Bell Telephone Company of Pennsylvania*, 373 F.Supp. 748, 751 (E.D.PA. 1974); aff'd. 510 F2d 971 (1975); cert. denied, 422 U.S. 1027 (1975) 42

Statutes:

United States Constitution

Article I, Section 8, Clause 3 49

Fifth Amendment 7, 33

Fourteenth Amendment 7, 33

United States Code

Federal Power Act, 16 U.S.C. § 824, *et seq*. 40

West Virginia Code

Chapter 24, Article 2, Section 4 2

Rules of the Supreme Court of the United States

Rule 16 1

Rule 35 4

IN THE

Supreme Court of the United States

October Term, 1977

No. 77-979

APPALACHIAN POWER COMPANY,
Appellant,

v.

THE PUBLIC SERVICE COMMISSION OF WEST VIRGINIA,
Appellee.

ON APPEAL FROM THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

MOTION TO DISMISS OR AFFIRM

Appellee, The Public Service Commission of West Virginia, pursuant to Rule 16 of the Rules of the Supreme Court of the United States, moves the Court to dismiss the appeal herein or in the alternative to affirm the judgment of the Supreme Court of Appeals of West Virginia on the grounds that it does not present a substantial federal question.

NATURE OF THE CASE AND PROCEEDINGS BELOW

On March 31, 1975, Appalachian Power Company (hereinafter "Appalachian" or "company") an electric public utility corporation operating in West Virginia, filed with the Public Service Commission of West Virginia (hereinafter "Commission"), pursuant to Chapter 24, Article 2, Section 4 of the West Virginia Code, 1931, as amended, (hereinafter "Code"), its tariff designated P.S.C. W.Va. No. 3, cancelling P.S.C. W.Va. No. 2, stating increased rates and charges for electric service in the territory served by it in West Virginia, to become effective May 1, 1975.

The filed rates would have increased rates about $40 Million annually; the test year was calendar 1974; and the Commission Case Number is 8182.

The Commission, by order of April 4, 1975, suspended the tariff filing and deferred the use of the rates and charges stated therein until August 28, 1975, at which time the rates became effective under bond, and subject to refund.

Evidentiary hearings were held by the Commission on sixteen days, beginning July 21, 1975, and ending August 31, 1976. The transcript of testimony contains 2,515 pages. Additional quantities of pre-filed testimony and exhibits are also in the file. Briefs were filed, and the last brief was filed November 9, 1976.

On May 6, 1977, the Commission entered its "Final Order" in Case No. 8182. (See Appendix, page B-1). The company filed a Petition for Rehearing, Reopening and Reargument, and the Petition was granted in part and denied in part by Commission order entered July 29, 1977. (Please see Appendix, page D-1). Other Commission

orders of August 26, 1977, and August 30, 1977, among other items stated therein, set the matter of rates from May 1, 1977, forward for further hearing which was held on October 27, 1977. (Please see Appendix, pages E-1 and F-1). An order of the Commission entered on January 13, 1978, established rates beginning May 1, 1977. (Please see Appendix, Page G-1).

It should be noted that the previous Commission orders had established rates for the first two of three periods ("tiers"); one, from August 28, 1975, through April 30, 1976; two, from May 1, 1976 through April 30, 1977; and the third of three periods being from May 1, 1977, until presumably March 1978.

In the meantime, on *September 12, 1977,* Appalachian filed a *new* tariff (P.S.C. W.Va. No. 4) increasing rates and charges approximately $85 Million annually, which the Commission suspended for 120 days beyond November 14, 1977. Hearings on this new matter (Commission Case No. 9091) began January 16, 1978, and further proceedings are scheduled in January and February, 1978.

On August 26, 1977, Appalachian petitioned the Supreme Court of Appeals of West Virginia (hereinafter "West Virginia Court") for review of Commission orders of May 6, 1977, and July 29, 1977. Appalachian raised a number of issues including West Virginia Constitutional issues, and United States Constitutional issues.

At issue before the West Virginia Court were rates of tiers one and two, from August 25, 1975 through April 30, 1977.

On October 10, 1977, the West Virginia Court, entered its order denying the Petition of Appalachian for Review (Please see Appendix, page A-1).

On October 14, 1977, Appalachian filed its Notice of Appeal to this Court. A stay of Commission orders was granted by The Honorable Chief Justice Warren E. Burger.

Appalachian filed its Jurisdictional Statement herein on January 7, 1978 (dated January 6, 1978 and received by Appellee January 9, 1978) and this Brief attached to Appellee's Motion to Dismiss or Affirm and filed therewith (Rule 35, Paragraph 1, Rules of the Supreme Court of the United States) is hereby submitted in opposition to Appalachian's appeal, and in support of the appellee's Motion to Dismiss the appeal or in the alternative to affirm the judgment of the West Virginia Court.

ARGUMENT — INTRODUCTION

This is a case based on public utility ratemaking by a state commission. The appellant, Appalachian, alleges unconstitutional "confiscation" of property, and further alleges a burden upon or interference with interstate commerce.

Both of appellant's contentions are without merit.

The appellant in its Jurisdictional Statement, pyramids a series of assumptions to support its case. It assumes that the regulatory commission has a responsibility to insure net earnings twice the amount of the interest owed, and that if it does not, this amounts to confiscation and a burden upon interstate commerce.

We will demonstrate below not only the invalidity of the proposition that coverage of 2.0 times should be a critical test in ratemaking, but also that Appalachian has by its own actions manipulated its financial data so as to make it appear that its coverage is lower than it is.

We will also demonstrate that case law, federal and state, holds that confiscation in ratemaking does not include as confiscation the failure to meet a 2.0 times coverage test, of net earnings over interest owed.

Also, we refute the contention that the Commission failed to consider Appalachian's capital attraction requirements in Case No. 8182.

All of which, when reviewed and studied, will lead to the conclusion that there is no merit to this appeal, that the net result of the appeal has been to obtain a stay of refunds for several months beyond October 1977, when ordered to be made, all pending the imposition of higher rates under bond in a *new* rate case in March of 1978.

Our Argument is contained in six parts as follows:

I. FAILURE TO ATTAIN A CERTAIN "COVERAGE" IS NOT "CONFISCATION" IN THE CONSTITUTIONAL SENSE: AND, THEREFORE, IS NOT A VIOLATION OF THE FIFTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION.

II. THE WEST VIRGINIA PUBLIC SERVICE COMMISSION DID CONSIDER APPALACHIAN'S CAPITAL ATTRACTION REQUIREMENTS IN ITS ORDERS OF MAY 6, 1977, AND JULY 29, 1977.

III. "COVERAGE" REQUIREMENTS IN PUBLIC UTILITY RATEMAKING.

A. WHY THE USE OF A "COVERAGE" REQUIREMENT AS A "CRITICAL TEST" OF

CONFISCATORY RATES IN PUBLIC UTILITY RATEMAKING IS UNSOUND, UNRELIABLE, AND JUST PLAIN WRONG.

B. COMMENTS ON EXACTLY HOW 2.0 TIMES COVERAGE AFFECTS EQUITY LEVELS.

IV. AS A MATTER OF FACT, WHAT IS APPALACHIAN'S FIRST MORTGAGE BOND "COVERAGE" IN 1977?

V. SOME COMMENTS ON APPALACHIAN'S CREDIT STANDING.

VI. THE COMMISSION ORDERS DO NOT UNCONSTITUTIONALLY BURDEN OR INTERFERE WITH INTERSTATE COMMERCE.

ARGUMENT

I. FAILURE TO ATTAIN A CERTAIN "COVERAGE" IS NOT "CONFISCATION" IN THE CONSTITUTIONAL SENSE; AND THEREFORE, IS NOT A VIOLATION OF THE FIFTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION.

Confiscation as used in public utility ratemaking, has been defined for many years by numerous courts, federal and state. To have "confiscation" the rates established by the ratemaking authority must be so low as to amount to a deprivation of property without just compensation. The rates must be below the "floor of confiscation." Between this floor of confiscation and the "ceiling of excessiveness" there is a broad range of reasonable and fair rates, over which reasonable men may differ, but which the courts have repeatedly held to be the duty of ratemaking bodies to establish.

The reasonable or fair return which the public utility realizes is a return over and above legitimate operating expenses, depreciation, and taxes. Nowhere in this formula have the courts ever said that the only reasonable or fair return is one which gives net earnings equal to two times or more the amount of interest owed.

There are numerous reasons why to say so would be unsound. Herewith follows our argument as supported by case law.

As stated above, "confiscation" in public utility ratemaking, to be in violation of the Fifth and Fourteenth Amendments of United States Constitution, must be of such a character as to amount to a deprivation of property without just compensation, or without due process of law.

San Diego Land & Town Co. v. *National City* 174 U.S. 739, 19 S.Ct. 804, 43 L.Ed. 1154 (1899).

Board of Public Utility Commissioners v. *New York Telephone Co.* 271 U.S. 23, 46 S.Ct. 363, 70 L.Ed. 808 (1926).

Denver Union Stock Yard Co. v. *United States,* 304 U.S. 470, 58 S.Ct. 990, 82 L.Ed. 1469 (1938).

The "fair" return, or "reasonable" return which makes up the "just compensation" is upon the value of the property *used* at the time that it *is rendering* public service.

Denver Union Stock Yard Co. v. *United States,* supra.

Board of Public Utility Commissioners v. *New York Telephone Co.*, supra.

Bluefield Water Works & Improvement Company v. *Public Service Commission,* 262 U.S. 679, 43 S.Ct. 675, 67 L.Ed. 1176 (1923).

McCardle v. *Indianapolis Water Co.*, 272 U.S. 400, 47 S.Ct. 144, 71 L.Ed. 316 (1927).

This principle: that the fair return must be on property *used* and *useful* in furnishing public utility service at the time the service is being furnished is also the law in West Virginia, as announced by its State Supreme Court.

In *Pittsburgh & West Virginia Glass Co.* v. *The Public Service Commission of West Virginia*, 101 W.Va. 63, 132 S.E. 497 (1926), the West Virginia Supreme Court, after stating that a Commission order fixing rates will not be disturbed unless the finding of fact is contrary to the evidence, or without evidence to support it, or there is a misapplication of legal principles; and after saying that probative value accorded by the Commission on substantial conflict of evidence will not be disturbed; the Court then states in Headnote No. 2, 101 W.Va. 64:

> "Rates — Burden of Proving a Rate to be Confiscatory is on Public Utility and Unless Evidence is Clear That Rate is Too Low to Afford Reasonable Return on Value of Property Order Fixing it Will Not be Disturbed.
>
> When a rate fixed by the Commission is attacked as confiscatory, the burden of proving it to be so is upon the public utility, and unless the evidence is clear that the rate is too low to afford a reasonable return on the value of the property used and useful in the service of the public the order fixing the rate will not be disturbed. (p. 67)"

Appellant contends that failure to meet a 2.0 times coverage test for net earnings is constitutional "confiscation."

This contention on its face does *not* meet the test or standard of constitutional confiscation set by this Court nor that set by the West Virginia Supreme Court.

In the case before this Court, the Commission granted a Rate of Return of *9.35%* which on a Rate Base of $488,976,907, being the value of the property of Appalachian *used* and *useful* in rendering electric service to West Virginia customers, amounts to an overall return of about $46,000,000 annually from the company's West Virginia operations alone. The annual rate of return of 9.35% includes an imputed return on equity of *12.8%*.

The Courts are not given powers to make rates or fix rates; and should inquire concerning results in order to uphold the constitutional guarantees against the taking of property without just compensation.

> *Mitchell Coal & Coke Co.* v. *Pennsylvania R. Co.* 230 U.S. 247, 33 S.Ct. 916, 57 L.Ed. 1472 (1913).
>
> *Pacific Gas & Electric Co.* v. *San Francisco* 265 U.S. 403, 44 S.Ct. 537, 68 L.Ed. 1075 (1924).
>
> *San Diego Land & Town Co.* v. *National City*, supra.

We submit in all seriousness that there is *no* deprivation of property without just compensation in this case when the Commission has granted a 9.35% Rate of Return on property used and useful in rendering electric service. Further Appalachian is unable to show that it has been deprived of any title, right, privilege or immunity protected by the Constitution.

The $46,000,000 annual return to Appalachian is well up and quite high in the "zone of reasonableness" contemplated by this Court, within which it will not set aside rates that produce such a return. If within this "zone of reasonableness" then such rates cannot be said to be unjust and unreasonable; and if the total effect of the rate order cannot be said to be unjust and unreasonable, judicial inquiry is at an end.

Mobil Oil Corp. v. *Federal Power Commission* 417 U.S. 283, 94 S.Ct. 2328, 41 L.Ed. 2d 72 (1974).

If the rate order cannot be said to be unjust and unreasonable, then the Court is not further obliged to examine every detail of the rate order, and it is then not important that the method employed to reach the result may contain infirmities.

Mobil Oil Corp. v. *Federal Power Commission*, supra.

Federal Power Commission v. *Hope Natural Gas Co.* 320 U.S. 591, 64 S.Ct. 281, 88 L.Ed. 333 (1944).

Appalachian's whole case rests upon establishing "confiscation" of such a nature as to amount to a deprivation of *property* by the Commission *without just compensation.*

This, Appalachian has not done and cannot do and the appeal must fail at this point.

Rates which allow a return of *$46,000,000* annually over and above *all* operating expenses, depreciation, and taxes, just simply are not a deprivation of property.

Within this "Zone of reasonableness" the determination of what is a reasonable rate for a public utility is a legislative responsibility (of the Commission) and not a judicial question for the Courts. Conclusions may differ as to what exactly is a fair return for a public utility. There is no exact rate which a public utility subject to legislative control can say that it has a "right" to obtain.

Munn v. *Illinois* 94 U.S. 113, 24 L.Ed. 77 (1876).

United Railways & Electric Co. v. *West*, 280 U.S. 234, 50 S.Ct. 123, 74 L.Ed. 390. (1930).

Willcox v. *Consolidated Gas Co.*, 212 U.S. 19, 29 S.Ct. 192, 53 L.Ed. 382 (1909).

Appalachian wishes to extend the threshold of the "zone of reasonableness" another $20,000,000 annually and this wish is not consistent with the law and not supported by the case law cited above and numerous other cases.

What then, is it that Appalachian wants? It wants to establish that *net earnings* before interest expense must, as a matter of constitutional law, be *twice* the amount of the interest owed by Appalachian, no matter what the amount of the debt.

Below in a separate section we will demonstrate, and we hope convincingly, why coverage of 2.0 times should not be a critical test of "confiscation" in ratemaking.

At this point it will suffice to say that no Court in this Nation at any Judicial level: Federal, State or Local has ever held that 2.0 times "coverage" is such a critical test.

On the contrary, in many cases the Court has rejected the argument that rates must, as a matter of law, be high enough to guarantee a net earnings of twice the amount of interest owed.

Typical are a Virginia Supreme Court case and an Idaho Public Utilities Commission case, which we take the liberty of citing, not as controlling, but as indicative of the reasoning of Commissions and Courts, other than in West Virginia, who have considered Appalachian's contention.

In Virginia, its Supreme Court affirmed its "State Corporation Commission" (Public Utility) in an electric company case in January, 1976, where the Commission had found a rate of return of 8.40% and a calculated

return of 11.24% on common equity to be proper. The Court in its decision states:

> "Accordingly, from an examination of this entire record, we hold that the overall rate of return established in this case is within the 'reasonably wide area' of legislative discretion and is therefore not erroneous as a matter of law."
>
> "On this record, we cannot accept Appalachian's contention that the 'Commission's decision to establish an overall rate of return of 8.40% and a calculated return of 11.24% places the Company in a financial position whereby it cannot raise the additional capital necessary to discharge its statutory duties.' This is but a reassertion, in a different context, of the issues discussed in Part I of this opinion and required no additional elaboration.
>
> For the reasons assigned, the order of the Commission is *Affirmed.*"

The question posed to the Virginia Supreme Court was identical with the question before this Court:

> "Third, were the ordered rates unjust and unreasonable and an unconstitutional deprivation of property without due process of law, 'if the end result of the Commission's decision leaves Appalachian in a financial position in which it is unable to attract the capital necessary for the proper discharge of its public duties.' The answer to each question is in the negative and we affirm."
>
> *Appalachian Power Company* v. *Commonwealth of Virginia,* Supreme Court of Virginia, 221 S.E. 2d 872 (1976).

A recent Idaho Public Utility Commission case dealt with this question of coverage and arrived at the conclusion that the simple calculation of an interest coverage ratio and the resulting revenue requirement is *not* a replacement for *sound* regulatory discretion.

We quote:

> "We have not accepted and do not now accept the proposition that the simple calculation of an interest coverage ratio and the resulting revenue requirement is a replacement for sound regulatory discretion. The revenue requirement to maintain any coverage ratio is greatly affected by changes in capital structure elemental components. The determination of what capital structure is appropriate for a utility has historically been left to management, and we do not understand applicant as recommending otherwise. Therefore, we cannot accept the maintenance of a coverage ratio as a governing factor in ratemaking."
>
> Re *Washington Water Power Company,* Idaho Public Utilities Commission, 17 PUR 4th 70 (1976).

And this Commission (West Virginia) likewise has recognized the broad range of reasonableness in ratemaking when in a recent case it states:

> " . . . there is a great deal of leeway for decision on *over-all* rate of return by a regulatory body. The lower limit of a fair rate of return on rate base is set by the constitutional protection against "confiscation". The upper limit is likewise a judgment decision of what would be an "Excessive" rate of return in the circumstances of each case. There is a broad band of reasonable earnings or reasonable rates of return between the "floor of confiscation" and the "ceiling of excessiveness"."
>
> *Columbia Gas of West Virginia, Inc.,* Case No. 8807 Public Service Commission of West Virginia (June 14, 1977) (Unreported).

And, this Court has on occasion upheld the principle that the return on investment may, consistent with the United States Constitution, be limited stringently by rate regulation, and that the investors' interests provide only

one of the variables in the "constitutional calculus of reasonableness."

> *Permian Basin Area Rate Cases*, 390 U.S. 747, 88 S. Ct. 1344, 20 L.Ed. 2d 312 (1968).
>
> *Federal Power Commission* v. *Texaco, Inc.*, 417 U.S. 380 94 S.Ct. 2315, 41 L.Ed. 2d 141 (1974).

Appalachian relies heavily on *Bluefield Water Works & Improvement Company* v. *Public Service Commission*, supra, and *Federal Power Commission* v. *Hope Natural Gas Co.*, supra.

We quote "Headnote 5" of *Bluefield Water Works and Improvement Company* v. *Public Service Commission of West Virginia*, 262 U.S. 679, 67 L.Ed. 1176 (1923) (Emphasis ours).

> "5. A public utility is entitled to such rates as will permit it to earn a return upon the value of the property *which it employs for the convenience of the public* equal to what generally being made at the same time and in the same general part of the country on investments in other business undertakings which are attended by *corresponding risks and uncertainties, but it has no constitutional right to profits such as are realized or anticipated in highly profitable enterprises or speculative ventures.*"

We note that *the property must be employed for the use of the public.* Also, one must realize that risk and uncertainty in regulated industry is less than unregulated industry. During periods of economic difficulty, utilities are assured an opportunity to earn a reasonable return on investment. Unregulated industry is not so assured. Appalachian would have the best of both worlds. It seeks to be assured of adequate earnings during periods of

economic difficulty, and an opportunity to make earnings comparable to unregulated industry during periods of economic bliss. The Court further found that there is no constitutional right to certain high "profits".

The United States Supreme Court adopts much of the above quoted principles and ideas in: *Federal Power Commission* v. *Hope Natural Gas Co.*, 320 U.S. 591, 64 S.Ct. 281, 88 L.Ed. 333, 51 PUR (NS) 193, (1944) at pages 602 and 603 of *320 U.S.*, (Emphasis ours).

> "We held in Federal Power Commission v. Natural Gas Pipeline Co. *supra*, that the Commission was not bound to the use of any single formula or combination of formulae in determining rates.
>
> Its rate-making function, moreover, involves the making of "Pragmatic adjustments." Id. at p. 586. And when the Commission's order is challenged in the courts, the question is whether that order "viewed in its entirety" meets the requirements of the act. Id. at p. 586. Under the statutory standard of "just and reasonable" *it is the result reached, not the method employed, which is controlling.* Cf. Los Angeles Gas & E. Corp. v. California R. Commission, 289 U.S. 287, 304, 305, 314, 77. L.Ed. 1180, PUR 1933C 229, 53 S.Ct. 637; West Ohio Gas Co. v. Ohio Pub. Utilities Commission (1935) 294 U.S. 63, 70, 79 L.Ed. 761, 6 PUR (NS) 449, 55 S.Ct. 316; West v. Chesapeake & P. Teleph. Co. 295 U.S. 662, 692, 693, 79 L.Ed. 1640, 8 PUR (NS) 433, 55 S.Ct. 894 (dissenting opinion). It is not theory but the impact of the rate order which counts. *If the total effect of the rate order cannot be said to be unjust and unreasonable, judicial inquiry under the act is at an end. The fact that the method employed to reach that result may contain infirmities is not then important. Moreover, the Commission's order does not become suspect by reason of the fact that it is challenged. It is the product of expert judgment which carries a pre-*

sumption of validity. And he who would upset the rate order under the act carries the heavy burden of making a convincing showing that it is invalid because it is unjust and unreasonable in its consequences. Cf. Railroad Commission v. Cumberland Teleph. & Teleg. Co. (1909) 212 U.S. 414, 53 L.Ed. 577, 29 S.Ct. 357; Lindheimer v. Illinois Bell Teleph. Co., *supra*, 292 U.S. at pp. 164, 169; California R. Commission v. Pacific Gas & E. Co. (1938) 302 U.S. 388, 401, 82 L.Ed. 319, 21 PUR (NS) 480, 58 S.Ct. 334.

The rate-making process under the act, i.e., the fixing of "just and reasonable" rates, involves a balancing of the investor and the consumer interests. Thus we stated in the Natural Gas Pipeline Company Case that *'regulation does not insure that the business shall produce net revenues.'* 315 U.S. at p. 590. But such considerations aside, the investor interest has a legitimate concern with the financial integrity of the company whose rates are being regulated. From the investor or company point of view it is important that there be enough revenue not only for operating expenses but also for the capital costs of the business. These include service on the debt and dividends on the stock. Cf. Chicago & G.T.R. Co. v. Wellman (1892) 143 U.S. 339, 345, 346, 36 L.Ed. 176, 12 Ct. 400. By that standard the return to the equity owner should be commensurate with returns on investments in other enterprises having corresponding risks. That return, moreover, should be sufficient to assure confidence in the financial integrity of the enterprise, so as to maintain its credit and attract capital. See Missouri ex. rel. Southwestern Bell Telph. Co. v. Public Service Commission, 262 U.S. 276, 291, 67 L.Ed. 981, PUR 1923C 193, 43 S.Ct. 544, 31 ALR 807 (Mr. Justice Brandeis concurring). *The conditions under which more or less might be allowed are not important here. Nor is it important to this case to determine the various permissible ways in which any rate base on which the return is computed might be arrived at. For we are of the*

view that the end result in this case cannot be condemned under the act as unjust and unreasonable from the investor or company viewpoint.

The United States Supreme Court did *not* condemn the end result of the Federal Power Commission decision from the *investor* or company *viewpoint.*

And, in the same United States Supreme Court case *(Federal Power Commission* v. *Hope Natural Gas Co.)* the Court speaks out on what legal avenues are open to companies when the future discloses a negative situation: (Page 615 of *320 U.S.*)

> *"It is suggested that the Commission has failed to perform its duty under the Act in that it has not allowed a return for gas production that will be enough to induce private enterprise to perform completely and efficiently its functions for the public. The Commission, however, was not oblivious of those matters. It considered them . . . No serious attempt has been made here to show that they are inadequate. We certainly cannot say that they are, unless we are to substitute our opinions for the expert judgment of the administrators to whom Congress entrusted the decision. Moreover, if in light of experience they turn out to be inadequate for development of new sources of supply, the doors of the Commission are open for increased allowances. This is not an order for all time. The Act contains machinery for obtaining rate adjustments."*

Not only is the machinery available to Appalachian, indeed, it has availed itself of such machinery and on September 12, 1977, it filed a new set of rates, which will become effective under the law within 120 days of November 14, 1977. The company should not make a mockery of judicial processes by using otherwise legal avenues to gain new consideration on rates, and then to complain of being

deprived of its constitutional rights to have reasonable and just rates.

This Court in *Federal Power Commission* v. *Hope*, supra, while saying that the investor interest should be considered, also said that regulation does not insure that the business shall produce net revenues. The Court then went on to say that there should be enough revenue for operating expenses, for *debt service* and for *stock dividends*. This is quite different from appellant's contention that net earnings should be twice the amount of interest owed. In the instant case, this Commission clearly provided for *operating expenses, depreciation, taxes* and *interest owed*. The 9.35% rate of return provides Appalachian with net operating profits of $46,000,000 annually from the company's West Virginia customers alone. This satisfies the criteria set forth in the *Hope* case.

It is interesting to note that, as Appalachian points out in its Jurisdictional Statement, both *Bluefield* and *Hope* were capitalized mainly by common equity and not debt. The investor interest that the Court alluded to was in fact an investor that had *not* had its company leveraged by its management to 60% plus *debt*. Obviously, the Court in both *Bluefield* and *Hope* could not have intended to equate the investor interest with an amount twice the annual interest requirement on debt *owed:* Especially when the management which leveraged the debt, and the equity investor (Appalachian is wholly owned by American Electric Power Company (AEP)) is for all purposes one and the same.

Appalachian cites *Mississippi Power Company* v. *Mississippi P.S.C.*, 291 So. 2d 541 (1974) as an example of a case wherein an order of a regulatory body was vacated for failure to give adequate consideration to the interest coverage necessary to attract new senior capital.

A close reading of the case indicates that the order was vacated because the Mississippi Commission's decision contained no findings of fact in support of its order, which was against the manifest weight of the undisputed evidence.

In conclusion, Appalachian has not shown confiscation. There is no issue of constitutional confiscation presented to this Honorable Court.

Appalachian's contention that coverage of 2.0 times is a critical test in ratemaking is without merit, and not supported in law, and for the reasons set forth in this section, we respectfully move that the appeal be dismissed, and that the decision of the West Virginia Supreme Court be affirmed.

II. THE WEST VIRGINIA PUBLIC SERVICE COMMISSION DID CONSIDER APPALACHIAN'S CAPITAL ATTRACTION REQUIREMENTS IN ITS ORDERS OF MAY 6, 1977, AND JULY 29, 1977.

The appellant emphasizes on numerous occasions in its "Jurisdictional Statement" that the Commission refused to consider the Capital Attraction Requirements. In fact it devotes a whole main section on pages 14, 15 and 16 of the Jurisdictional Statement entitled "The Commission's Refusal to Consider Capital Attraction Requirements."

These assertions are not consistent with the facts.

The Commission *did consider* Appalachian's capital requirements on pages 22 to 25, inclusive, and page 32 of its order of May 6, 1977, and pages 7 to 9, inclusive of its order of July 29, 1977.

(Appalachian *Appendix*, pages 28-a to 31-a, inclusive, and page 40-a of order of May 6, 1977,

and pages 90-a to 92-a, inclusive of order of July 29, 1977).

(Commission *Appendix*, pages B-28 to B-31, inclusive, B-40 and B-41, and D-9 to D-11, inclusive).

Because of Appalachian's insistence as an integral part of its case that the Commission did not consider these matters, we quote liberally from the Commission May 6, 1977 order (from within the aforesaid cited pages):

> "An equally important consideration in determining rate of return is the necessity for higher earnings. If higher earnings are needed for improvident or excessively accelerated expansion or for excessive return to the common equity owners, the requested rate of return would be too high.
>
> Here, however, Appalachian carried its burden of showing a need for rate of return higher than the 8.73% previously allowed, albeit not at the levels requested. Appalachian presented evidence that its senior securities and commercial paper had been downgraded to be at the lowest rating of all of the major electric utilities in the country. It argues that its debt coverage is dangerously low, so as to limit its ability to finance growth needed for its generating and transmission capacity. Appalachian argues that it needs higher rates to restore to a normal construction level its project 1300 megawatt generating unit partially completed at its site in New Haven, Mason County, West Virginia. In Case No. 8401, by order issued April 29, 1976, this Commission certificated Appalachian's 765-kV high voltage transmission line to run from Culloden in Cabell County to Wyoming County, West Virginia, while recognizing that Appalachian contended that it needed rate relief in Case No. 8182 in order to construct the $72 million project. Appalachian estimates its 1976-1980 construction program will require up to $1.3 billion, which would average $260 million per year. A portion of this financial requirement will be generated internally, with the

> balance raised from investors. In either case, Appalachian will require an improvement in earnings to be able to continue a reasonable growth to satisfy the electricity demands of an energy-short public.
>
> There are several considerations, however, which militate against allowing a rate of return as high as is recommended by Staff or by Appalachian. First, the Commission has been liberal in its allowance of adjustments to fuel expense and other expenses for the second-tier rates. Second, we have permitted a measure of CWIP in rate base. Third, as discussed below, we are allowing a partial normalization of federal income taxes in order to improve the quality of earnings and to encourage growth of plant. Fourth, we have grave reservations about whether or not West Virginia is paying its proper share of total costs vis-a-vis sales by Appalachian subject to other regulatory bodies as discussed below. Finally, the customers of Appalachian in West Virginia are not able to give it *carte blanche* for unlimited rate increases which cannot be absorbed by their limited incomes.
>
> In the light of all of these considerations and the evidence, the Commission finds in its judgment that the allowable rate of return on rate base for Appalachian in this case is 9.35% for West Virginia.
>
> It is hoped that Appalachian will be able to reduce unnecessary or unreasonable costs — such as (1) its cost of coal purchased from its affiliates and (2) other Account 501 fuel costs — in order to earn *more* than 9.35% on total capitalization. The actual results of future fiscal periods will reflect the good or bad results of management decisions, increased sales volumes, and efficiencies that will come with additional modern generating units and high voltage transmission systems. By keeping rates at levels which will recover no more than the lowest possible *reasonable* level of test year costs, we

regulate in a balanced way to induce management to search for cost reductions, prudent growth, and greater efficiencies in operations."

(Commission Appendix, Pages B-29 to B-31, inclusive)

Indeed the Commission did consider the matters, and for valid reasons did not fully agree with Appalachian. It is confusing for Appalachian to now say the Commission did not consider said matters.

We submit that the Commission not only did consider, but fully considered Appalachian's capital attraction requirements.

III. "COVERAGE" REQUIREMENTS IN PUBLIC UTLITY RATEMAKING.

A. WHY THE USE OF A "COVERAGE" REQUIREMENT AS A "CRITICAL TEST" OF CONFISCATORY RATES IN PUBLIC UTILITY RATEMAKING IS UNSOUND, UNRELIABLE, AND JUST PLAIN WRONG.

Bond Coverage is the ratio between net earnings and the Bond Interest owed, i.e. if "net earnings" amount to $4,000,000 and interest expense amounts to $2,000,000, it is said that coverage is 2.0:

$$\frac{\$4,000,000}{\$2,000,000} = 2.0$$

Appalachian has misled this Court by presenting its case in such a manner to show that low revenues are the sole blame for inadequate coverage. The facts are: *That coverage is not dependent solely on revenues, but rather on the numerous factors which make up a public utiity coverage ratio, only one of which is revenues.*

The following data facilitates our review of the development and calculations of net earnings and interest coverage:

TABLE I

Operating Revenues		$580,000,000
Operating Expenses	$380,000,000	
Depreciation	50,000,000	
Taxes Other Than Income	35,000,000	465,000,000
Net Operating Earnings		$115,000,000
Other Income		11,500,000
Net Earnings		$126,000,000
Interest Expense		$ 68,000,000
Coverage		1.85 times

A review of the data in Table 1, above, shows that "net earnings" will vary directly with "revenue" and inversely with "operating expenses," with "depreciation," and with "taxes." An increase of $10,000,000 in revenue will increase net earnings (Table I) and will result in coverage of 2.0, rather than 1.85.

Therefore, following Appalachian's argument, one might be led to believe that the solution to increasing coverage from 1.85 to 2.0 would be to increase revenues by $10,000,000. What Appalachian fails to mention is that: A *decrease* in *expenses*, or a *decrease* in *depreciation*, or a *decrease* in *taxes*, (or a combination), in the amount of $10,000,000 would have the same effect on coverage as increasing revenue by $10,000,000. *Any* action, on the part of the company, which would decrease its deductions (operating expense, depreciation, or taxes) by $10,000,000 would, in the example, increase the coverage from 1.85 to 2.0.

Given the apparent problem facing the hypothetical company in Table I, where does the fault for inadequate coverage lie? Is it in the regulatory commission for not allowing rates sufficient to produce the additional $10,000,000 in revenue, or is it in company management for failing to hold expenditures at lower levels?

A reviewing body must not be misled by Petitioner's narrow argument that additional revenue is the sole solution; and it should be recognized that there are numerous problems, and yes, numerous alternate solutions, in the event of inadequate coverage.

Secondly: The *level* or amount of interest expense, itself, is an essential factor in determining interest coverage ratio. From Table I above we see that coverage is the quotient of earnings divided by interest. As interest expense is reduced, and all other factors remain unchanged, the level of coverage will increase. In the example (Table I), if the interest is reduced by $5,000,000, to $63,000,000, then coverage ratio would increase from 1.85 to 2.0.

From the above it becomes obvious that the *level* or amount of the company's *debt* is a critical factor.

An important point now needs be made. In West Virginia the Public Service Commission, under the law, exercises no control over the capital "leverage" exercised by public utilities. In many states, the public utilities commissions exercise control over the capitalization and capital "leverage" of public utilities.

In our State, the choice and amount of capitalization is a company choice; it is a "management" discretion.

In short, whether a company divides its *Capital:*

10% Debt - 90% Equity, *or*
50% Debt - 50% Equity, *or*
60% Debt - 40% Equity,

is a company or management responsibility. Obviously, a company's total debt interest requirement will vary directly with the amount of total debt.

It also follows that a raise in the *percentage* of *debt* capital, given a fixed Rate of Return, and a fixed interest rate, will *invariably increase* the percentage of the *return on equity*, when the rate of return is more than the interest rate.

Thus, the equity holders do benefit from a percentage increase in debt capital; an increase decided on by management.

Further it follows that where management has a choice of "borrowing" at say 10% or a few days later at 8.5%, a decision to borrow "now" at 10% invariably will enhance the equity return (if we assume the critical test of 2.0). There not only is no incentive to borrow at the lower interest rate, but it becomes "profitable" to the equity holders to borrow at the higher interest rate.

Further, the higher interest amount owed at 10% borrowing, rather than 8.5% borrowing, not only requires a higher revenue level to meet coverage tests (assuming 2.0) but in *itself* becomes a cause of requiring higher revenues because it is a higher expense item.

To demonstrate the effect of management decisions to increase debt capital let us examine the following table:

TABLE 2
Determination of Post-Income Tax Coverage and Return on Equity Assuming a 9% Overall Return and an 8% Interest Rate

Total Capital	$100	$100	$100	$100	$100	$100	$100
Percentage of Debt Capital	10%	20%	30%	40%	50%	60%	70%
Percentage of Equity Capital	90%	80%	70%	60%	50%	40%	30%
Net Earnings from Operations	$9.00	$9.00	$9.00	$9.00	$9.00	$9.00	$9.00
Interest	$ .80	$1.60	$2.40	$3.20	$4.00	$4.80	$5.60
Coverage	11.25	5.63	3.75	2.81	2.25	1.67	1.43
Return on Equity	9.1%	9.25%	9.43%	9.17%	10%	10.5%	11.3%

As is evident from reviewing Table 2 it is desirable, from the stockholder's point of view, for management to utilize capital leverage. As the percentage of equity capital decreases in relation to total capital the equity holders enjoy increased returns on their investment. From the table we see that a company with a very small percentage of debt capital, say 10% debt and 90% equity, if allowed to earn an overall return on 9%, will earn 9.1% on equity. This same company will have an interest coverage of *11.25 times*. As the company increases its percentage of debt capital, say to 20% debt and 80% equity, the return to equity holders increases to 9.25%. The off-set, however, is that coverage drops to *5.63 times*. As a company increases its percentage of debt to a very highly leveraged level of 60% the return on equity raises to 10.5%. The problem with extensive debt levels, however, is evident in the fact that at 60% debt and 40% equity the coverage has dropped to *1.67 times*.

Over the past five calendar years Appalachian's senior capital as a percentage of total capital has ranged from 67.51% to 70.23%.

TABLE 3
APPALACHIAN CAPITAL STRUCTURE

Particulars	1976 (000)	1975 (000)	1974 (000)	1973 (000)	1972 (000)	Average of 5 yrs.
Long-Term Debt:	60.58	60.72	56.35	58.08	60.87	59.32
Short-Term Debt:	.67	.07	5.51	1.57	.49	1.66
Preferred Stock:	7.28	7.82	8.41	7.86	8.88	8.05
Total Senior Capital:	68.53	68.61	70.27	67.51	70.23	69.03
Common Equity:	31.47	31.39	29.73	32.49	29.77	30.97

Note: 1976 Figures are estimates
Source: Company Annual Reports

The result of a high debt ratio is a tendency for interest coverage to decline. A company can provide its stockholders with maximized returns through employment of capital leverage. Why then, when management decisions begin to show weaknesses of declining interest coverage, should the company look to the ratepayers to offset the declining coverage levels through higher rates?

For the purpose of analyzing effects of management decisions on coverage and equity return the following table will be helpful:

TABLE 4

Debt	$ 60 at 8%	=	$4.80
Equity	$ 40	=	4.80
Total	$100	=	$9.60

In this example, a company has total capital of $100, consisting of $60 debt and $40 equity. With the debt rate equal to 8%, the cost of debt is $4.80. Therefore, to maintain an aftertax coverage of *two times* it is necessary for the equity to earn $4.80 for a total after tax earnings of $9.60.

Let us assume that this hypothetical company, a regulated utility, has been assured that it will be allowed to maintain the two times coverage. Let us further assume that the company is faced with retiring its $60 debt and management has been counseled that an immediate debt issue will be at a 10% rate. On the other hand, there are strong indications that capital pressure is about to decline and interest rates will ease so that an offering in 45 to 60 days may be marketed at 8.5%. Given this set of circumstances, what choice should be made by management?

The following table shows the results (given the two times coverage guarantee) of the two alternatives:

TABLE 5

	1 - Borrow at 10%		2 - Borrow at 8.5%	
Debt	$ 60 at 10%	$ 6.00	$ 60 at 8.5%	$ 5.10
Equity	$ 40	$ 6.00	$ 40	$5.10
Total	$100	$12.00	$100	$10.20

The reward to equity holders of an imprudent management decision is evident. In the original table, (with an 8% interest rate) the earning on equity required to maintain the two times coverage was $4.80. Therefore, equity holders were earning at a rate of 12% ($4.80 divided by $40). Under alternative one, borrowing now at 10%, the return to equity holders will jump to 15% ($6 divided by $40) if the two times coverage is to be maintained. On the other hand, if management elects to follow prudent judgment and borrow at 8.5% the return to equity holders is only $5.10, or *12.75%*, if the two times coverage is to be maintained.

We see now that the result of "covering" each additional interest dollar at least *twice* is a *bonanza* for

the company's common equity holders. We submit that this concept of "cost-plus" and its resulting management inefficiency is what Appalachian Power Company is requesting.

Using our simplified example, what if the company required additional financing of $15 even at the original 8% interest rate? If the company elected to finance the entire $15 through debt the result would appear as follows:

TABLE 6

Debt	$ 75 at 8%	=	$ 6.00
Equity	$ 40	=	$ 6.00
Total	$115	=	$12.00

Because of the additional interest requirement, even at the same 8% rate, in order to maintain a two times coverage the equity earnings must increase to $6, and the resulting return to equity holders would be *15%* ($6 divided by $40). Hence, we again see the enhancement of equity return through utilization of capital leverage. Merely by deciding to finance the $15 totally through debt the company has provided for a return on equity of *15%* in place of 12%.

Operating with the constraints of the two times requirement what decision will this company make if told that the additional $15 in debt will result in closer market scrutiny of the company's excessive debt ratios and an increase in its interest rates from 8% to at least 9%? Once again, maintaining a two times coverage, such an increase would enhance and further increase the return to the equity holder. The $75 debt at a 90% rate of interest would require $6.75. The equity earnings requirement then would increase to *$6.75* in order to maintain the two times

coverage and the resultant return to common equity holders would be *17%* ($6.75 divided by $40).

Interest charges on Appalachian's long-term debt has risen from $36,160,000 in 1972 to $71,455,000 in 1976. Appalachian has obviously chosen to increase debt at a time when interest rates are highest.

TABLE 7
APPALACHIAN INTEREST COST
AS OF DECEMBER 31

Particulars	1976 (000)	1975 (000)	1974 (000)	1973 (000)	1972 (000)
1. Interest Charges on Long-Term Debt:	71,455	64,954	48,743	43,398	36,160
2. Interest on Short-Term Debt:	800	76	8,719	1,485	236
3. Average rate % of Long-Term Debt:	7.86	7.64	6.63	6.55	5.85
4. Average % Rate on Short-Term Debt:	8.00	7.63	12.12	8.30	4.72
5. Weighted Average Cost of Long-Term Debt: %	4.76	4.64	3.74	3.80	3.56
6. Weighted Average Cost of Short-Term Debt: %	.05	.01	.67	.13	.02
7. Total Weighted Cost:%	4.81	4.65	4.41	3.93	3.58

This Commission cannot condone, and our earnest hope is that this court will not condone, regulatory policies which could conceivably reward poor or imprudent management through enhancement of equity returns.

To establish as a critical test the 2.0 coverage requirement, will open the door of the public utility regulation field to higher and higher profits, as well as higher and higher customer rates to support the capital structure "body", the head of which is interest "coverage", and the tail of which tags along, which is the equity return.

It should be kept in mind that what Appalachian complains of, asserting a 1.80 coverage which inevitably will be greater, is *not* that it is losing money; but that its *Return* or Net Earnings should be higher. In fact the Commission in Case No. 8182 provided for almost $46,000,000 as an annual amount of return.

For these reasons, we submit that it is unsound, unwise, and wrong to adopt the 2.0 coverage test as a critical test of confiscation.

The problem is further compounded when a public utility makes customer sales in more than one state, and also makes sales governed by the Federal Power Commission. Appalachian was granted a twenty-five percent (25%) increase in its sales for resale rate before the FPC in July of 1977. Appalachian was also granted increased rates by the Virginia Commission effective November 1, 1977. Are West Virginia subscribers required to subsidize Virginia ratepayers when Appalachian's earnings are deficient there? They will if the coverage test is used to determine confiscation. Assume that in all of its operational jurisdictions, plus FPC, the utility shows a negative coverage test. How then should the responsibility for meeting the 2.0 test be managed? Which jurisdiction? How much? How do we synchronize this support of the utility?

Here the intrastate aspect of sales to customers becomes not only a term of description, but a reality, and in the real world of service to West Virginia customers, the Commission rightly reviews the evidence *only* relating to the West Virginia operation. What is a reasonable, just, and fair, rate for the West Virginia customers? That is the principle which guides the West Virginia Commission; not a "critical test" that may first appear in the company indenture, and becomes a "Statement of Policy" of the Securities and Exchange Commission.

Of lesser consequence, is the choice that company management has of what part of its income to pay out as dividends, and what part to retain as earned surplus.

A company may easily have, for five to ten years, a "dividends" profile of exceedingly high declarations. This results in equity being lowered and debt being increased, with accompanying increases in total interest. Now that it "needs" money to cover its "interest" is it right to expect that "dividends" continue at a high level while the required interest *coverage* dollars, in excess of actual interest requirements, are obtained from ratepayers?

All of these considerations lead to the conclusion that the interest "coverage" requirement of 2.0 is unsound, and we earnestly submit to this Court that such a "critical test" should not become a part of sound public utility rate making.

B. COMMENTS ON EXACTLY HOW 2.0 TIMES COVERAGE AFFECTS EQUITY LEVELS

Appalachian in its Jurisdictional Statement raises two questions or issues. The first is: Must a State Public Utility Regulation Commission, as a matter of law, establish rates, whether otherwise justifiable or not as reasonable and just, which rates would return to the utility as *net earnings* twice the amount of the interest owed by the public utility, irrespective of the amount of the debt, the rate of interest, or of the numerous management decisions involved, which decisions result in not only the overall level of debt capital, but also which decisions affect other factors which result in defined net earnings.

Appalachian is contending that a test of the reasonableness of rates granted by a state regulatory agency must be predicated on those rates producing net earnings before

interest which are equal to at least two times the annual interest requirement of the public utility. Under such a test, a utility could be given exorbitant, unwarranted, and unconscionable profits for its equity by employing unwise and unsound management decisions with regard to debt levels.

In brief, as a matter of law, does the United States Consitution, Fifth and Fourteenth Amendments, guarantee to a utility such as Appalachian that its net earnings before interest expense must be at least $40,000,000 when its annual interest on long-term debt is $20,000,000; that if its interest becomes $35,000,000 (for whatever reasons) the net earnings must equal or exceed $70,000,000; and when the interest expense grows to $70,000,000 the net earnings must equal or exceed $140,000,000? Appalachian is maintaining that such a progression of net earnings is "guaranteed" as follows:

Annual Interest	Net Earnings Before Interest	Net Earnings for Stockholders
$20,000,000	$ 40,000,000	$20,000,000
35,000,000	70,000,000	35,000,000
70,000,000	140,000,000	70,000,000

As can be seen, Appalachian's issue regarding coverage is based on a guaranteed dollar for dollar increase in earnings available for stockholders as its interest expense is increased, regardless of the justification for such an increase in earnings to stockholders and regardless of the rate of return on stockholder's investment which may result.

In a simple situation, under Appalachian's insistence that earnings must be maintained at two times the level of interest on long-term debt, if the *interest expense* of a company grows from $35,000,000 to $70,000,000, then the portion of net earnings available to equity holders must grow to provide two dollars of the pre-tax earnings for each dollar of interest expense. Appalachian holds that it is constitutionally guaranteed that rate payers pay rates sufficient to provide such an increase in earnings to stockholders regardless of the level of capital invested by stockholders.

Let us assume that when debt cost was $35,000,000 the regulatory commission allowed earnings, before interest, of $91,000,000, leaving a balance of $56,000,000 for stockholders. If stockholder investment amounted to $300,000,000 in this business the resulting return on stockholders' equity would be 18.7%, a very substantial figure. Furthermore, since the coverage of interest is 2.6 times (91 ÷ 35) no one could say, on the basis of any conceivable "test" that the rates contributing to a 2.6 times interest coverage level and a 18.7% return on equity could be unconstitutional. Let us further assume, however, that in a subsequent year, because of increasing interest levels and rates, the company's annual interest increases to $70,000,000. The regulatory agency determines that the additional $35,000,000 expense should be recovered through rates and, consequently, approved rates which result in an increase in net earnings before interest of $35,000,000, up to the level of $126,000,000 ($91,000,000 plus $35,000,000). The balance, available to stockholders, remains at $56,000,000 and the rate of return on stockholder's investment remains at 18.7%. However, the coverage of interest is now reduced to 1.8 times (126 ÷ 70). Appalachian argues that *now* the $56,000,000 profit on equity is *unconstitutional* because the net defined earnings are not sufficient to "cover" interest two times.

Under Appalachian's approach of constitutional tests for reasonableness of a utility's earnings, $56,000,000 profits on equity resulting in a 18.7% return on stockholder's investment is constitutional if the company's annual interest on debt is $35,000,000; but $56,000,000 profits on equity resulting, in a return on stockholder's investment of 18.7%, is unconstitutional when annual interest on debt becomes $70,000,000.

Under Appalachian's approach, the earnings on equity, in the above cited example, *must* increase from $56,000,000 to a *minimum* of $70,000,000 (increasing return on investment to 23%) merely because of the increased expense. The equity earnings in this case accrue to the sole stockholder: The American Electric Power System (hereinafter "AEP").

IV. AS A MATTER OF FACT, WHAT IS APPALACHAIN'S FIRST MORTGAGE BOND "COVERAGE" IN 1977?

The following data is based on Company Annual Reports and Financial Statements.

Appalachian's total company coverage for calendar year ended December 31, 1976, for first mortgage bonds was *2.0* times.

Indeed, Appalachian issued First Mortgage Bonds three times in *1975* in the amount of $150,000,000 and twice in *1976* in the amount of $130,000,000.

The appellant, Appalachian, poses its argument as if the only way to improve coverage is to receive additional revenues from its customers. One significant way to improve coverage that the company conveniently overlooks, is a reasonable modification of its capital structure.

On December 31, 1976, Appalachian's capitalization consisted of 32% common stock, 7% preferred equity, and *61%* long-term debt. This Commission is no way responsible for Appalachian placing itself in such a highly leveraged position with the expensive levels of long-term debt.

Likewise, the return on common equity, based on 1976 cost levels of long-term debt and preferred stock, and based on an overall rate of return of 9.35% (granted by this Commission in Case No. 8182) amounts to *13.2%* for Appalachian.

Now, a reasonable modification of capital structure, in view of coverage difficulties, to a 55% long-term debt (from 61%), to 38% common equity and 7% preferred equity, would improve the company's coverage position for the year ended December 31, 1976, from 2.0 to *2.3*. But, the common equity return would reduce from 13.2% to 12.3%, which surely is still well within the zone of reasonableness. The company, exercising management discretion, chose to *not* modify its capital structure. We now make an important point. In West Virginia, this Commission does not rule on or control a public utility's capitalization. The public utility has full control of its capitalization ratios.

Clearly, we are indicating that factors other than revenues substantially affect the amount of coverage.

The company's coverage as of August 31, 1977, for first mortgage bonds, at Commission granted "tier two" rate levels is 1.85 times. An increase of $9.6 Million in revenues would indeed bring this twelve month period coverage level up to 2.0 times.

This Commission, in its Case No. 8182 (reopened), did grant Appalachian additional rates effective May 1, 1977, which have the effect of increasing revenues $10,000,000 annually. (Appendix beginning at Page F-1). Additionally, the Virginia Corporation Commission has granted Appalachian increased rates effective November 1, 1977; and the Federal Power Commission granted increased rates effective July 1, 1977. (Incidentally the rates granted by the Virginia Corporation Commission, effective November 1, 1977, produce a Rate of Return of 9.14%, being less than the West Virginia Rate of Return for Appalachian of *9.35%*).

More importantly, respecting West Virginia, Appalachian has completely failed to disclose two items which materially affect its coverage for the twelve-month period ended August 31, 1977.

The first is a depreciation expense item of $1.4 Million which inflates expenses. Appalachian hereby employs an improper accounting method and one not approved by this Commission. For coverage calculation purposes, Appalachian added this $1.4 Million as an expense. It seems that the company is just determined to paint the worst picture, improperly, and then to blame this Commission for its "low" coverage levels.

The second item which Appalachian has conveniently failed to disclose relates to approximately $90 Million invested in subsidiary companies (primarily coal mining). This investment of Appalachian is funded by its total capital, which is 61% debt. A substantial portion of Appalachian's interest expense is associated with these investments in the subsidiary companies. Yet, Appalachian fails to file a consolidated income statement and thereby fails to include $5,000,000 in earnings of its subsidiaries in its coverage calculations. This failure in

no way is due to any directive or order of this Commission, but is a management decision of Appalachian.

A meaningful effort by the company to reflect its coverage accurately for the year ended August 31, 1977, should certainly include the $1.4 Million and the $5 Million which alone would improve August coverage for first mortgage bonds from 1.85 times to 1.95 times; and when we reflect the four months of granted West Virginia tier-three rates from May 1, 1977, through August 31, 1977 ($3.3 Million), the first mortgage bond coverage then exceeds *2.0 times*, as of August 31, 1977.

These are the vagaries of management decision that make unreliable the coverage requirement of 2.0 times as a critical test or as a "must" in public utility ratemaking.

United Fuel Gas Company v. *Railroad Commission*, 278 U.S. 300 49 S.Ct. 150, 73 L.Ed. 390, (1929) holds: A public service corporation cannot make a rate confiscatory by reducing its net earnings through the device of contract unduly favoring a subsidiary or a corporation owned by its stockholders.

And, likewise, Appalachian should not reduce its net defined earnings by failure to include subsidiary earnings.

V. SOME COMMENTS ON APPALACHIAN'S CREDIT STANDING

In its Jurisdictional Statement, Appalachian, on Page 17, refers to downgrading by Standard and Poor's of its First Mortgage Bonds. It relates this downgrading to an "impairment of credit", and then lays the "erosion" of the credit at the doorstep of the Commission.

However, a close reading of Standard and Poor's statement on Page 17, Jurisdictional Statement, demon-

strates that the "changed rating" of First Mortgage Bonds is based on three reasons.

One is *the high percentage of long-term debt in its (Appalachian's) capitalization.* We have dealt at some length in the previous section and other sections on the effects of an unusually high percentage of long-term debt. Such a high percentage is damaging in numerous ways.

Indeed, Appalachian's own witness, H. Russell Fraser, in Case No. 8182, Page 1890, Transcript, deems the management decision to forego a "less conservative capitalization" as being an important factor in the position Apppalchian finds itself in.

Second is *the sizeable amount of revenues being collected subject to refund.* While indirectly this Commission may be said to be a cause of this, more directly, the company practice of filing for *twice* or more the amount of rate increase later found to be reasonable and just, causes the high amount of revenues collected subject to refund.

Third is the *less than adequate rate relief granted the company over the past several years,* particularly in West Virginia . The words used do include Virginia and the Federal Power Commission. And, any inadequate rate relief in large measure may have its genesis in an extremely high percentage of long-term debt, and its cure in a more reasonable percentage of long-term debt.

We do not dispute the company's evaluation of its credit position but we find it extremely difficult to believe with the company, that it arrived there free of the blemishes and bruises that came as a result of "management decisions". Again, we stress that in West Virginia, (contrary to the position on Page 15 of the Jurisdictional Statement re: this Commission's responsibility as to regulating the reasonableness of Appalachian's capital struc-

ture) this Commission does not, and has never, regulated capital structure. Such is a company responsibility, and thus the company must live with the fruit that its decisions bear.

VI. THE COMMISSION ORDERS DO NOT UNCONSTITUTIONALLY BURDEN OR INTERFERE WITH INTERSTATE COMMERCE.

The Appellee submits to this Honorable Court that the West Virginia Public Service Commission orders in Case No. 8182 do not unconstitutionally burden or interfere with interstate commerce. Moreover, the Appellant in presenting this second question has based its issue on the fact that the rates ordered by the Commission in Case No. 8182 are so low as to preclude the Appellant from raising capital necessary for timely construction of facilities and therefore burden interstate commerce. As hereinbefore discussed, it is submitted that the Appellant has failed to demonstrate that its rates are legally confiscatory as to preclude it from raising the necessary capital to *timely* construct facilities for its customers. For that reason, the Appellee contends that the rates imposed by this Commission in no way burden interstate commerce.

The Appellant contends that Appalachian is engaged in interstate commerce as it transmits energy across state lines. The Appellee readily agrees that this statement is true; however, it is submitted that the case at bar concerns the sale of electricity of an *intrastate* nature over which the Appellee has, by law, jurisdiction. The Federal Power Act (16 U.S.C. §824), explicitly grants the Federal government jurisdiction only to those matters which are not subject to regulation by the states. Section 201(a), Part II of the Federal Power Act states the following:

> "It is hereby declared that the business of transmitting and selling electric energy for ultimate distribution to the public is affected with the public interest, and the federal regulation of matters relating to generation to the extent provided in this Part and the Part next following and of that part of such business which consists of transmission of electric energy and interstate commerce and the sale of such energy at wholesale interstate commerce is necessary in the public interest, such federal regulation, however, *to extend only to those matters which are not subject to regulation by the states* . . . (emphasis provided)

The matters before the West Virginia Public Service Commission concern only sales of electricity of an *intrastate* nature, and not sales at *wholesale.* It is submitted by the Appellee that the matters that are before this Honorable Court concern local rates and therefore do not per se constitute interference with interstate commerce. In the case of *Preston County Light and Power Company* v. *Public Service Commission of West Virginia,* 297 F.Supp. 759, 763 (S.D. W.Va. 1969), the District Court held as follows:

> ". . . Mere inadequacy of a local rate prescribed by competent authority does not per se constitute interference with interstate commerce. There is, however, apparently, no established rule as to what degree of affect on interstate commerce is sufficient to constitute an interference therewith. To say that the degree of interference must meet the limit of confiscation of property begs a question, since there are no well defined guidelines of the degree of effect that amounts to confiscation. Each case must necessarily be dealt with on its own facts and circumstances. Assuredly, if the rates involved in the present case were found to directly interfere with interstate commerce by being confiscatory or otherwise, the Johnson Act would, of course, not be applicable . . ."

The rates that are in question in the case at bar are of a local nature and do not involve interstate commerce and further, these rates are not confiscatory within the guidelines established by the United States Supreme Court as hereinbefore discussed. In the case of *Kansas-Nebraska Natural Gas Company* v. *The City of St. Edward*, 134 F. Supp. 809, 825 (D. Neb. 1955), the District Court stated the following:

> ". . . The Congress thus left to the state the problem of regulating the local distribution and marketing and sale price of natural gas, notwithstanding its importation for that purpose in interstate commerce . . . Mere inadequacy of a local rate prescribed by a competent authority for natural gas imported by interstate pipeline 'interfer[s] with interstate commerce' . . . That the rate prescriptions of several ordinances, indirectly and incidently affect interstate commerce may be granted; it does not follow therefrom that they interfere with such commerce . . ."

The Appellee contends that the rate prescriptions of this Commission's orders have at the most only an indirect and incidental effect upon interstate commerce.

In the case of *Zucker* v. *Bell Telephone Company of Pennsylvania*, 373 F.Supp. 748, 751 (E.D. PA. 1974); aff'd. 510 F2d 971 (1975); cert. denied, 422 U.S. 1027 (1975), the Eastern District Court of Pennsylvania held as follows:

> ". . . The courts have found that state agency orders applicable to intrastate telephone rates do not interfere with interstate commerce . . ."

Upon analyzing and perusing the Appellant's jurisdictional statement one would be led to believe that if this Honorable Court does not grant the relief that the Appellant is seeking, the entire country would be estopped from conducting its normal business for the reason that

Appalachian will not be able to provide electricity. Obviously, this argument or contention is without merit in that Appalachian is only one of a host of electric generating companies in the nation that are providing electricity for energy needs. In addition, there are multitudes of other energy resources which our nation is relying upon for energy needs. The appellant has created an obvious hyperbole that does not exist.

The Appellant discusses the scope of its responsibility in providing service and contends that this service reaches beyond the State of West Virginia to retail customers in Virginia and to twenty-one firm wholesale customers in Virginia, West Virginia and Tennessee. It further states that it supplies wholesale electric service (non-firm) both within and outside of its retail market area directly and indirectly by bulk transmission or displacement not only to the integrated American Electric Power System but also to 26 major utilities supply systems that makeup the regional grid known as the East Central Area Reliability Group (ECAR) and through system interconnect, non-ECAR electric utilities which include TVA, Carolina Power and Light, Duke Power, Commonwealth Edison, Illinois Power, Central Illinois Public Service Company; however, the Appellant has failed to disclose further factors which are important regarding this issue.

The Appellant's own witness, Mr. Theodore J. Nagel, Senior Executive Vice-President and Assistant to the Chairman of American Electric Power Service Corporation stated concerning "non-firm" sales during the course of proceedings before the Commission that "neither APCo or AEP plans or constructs facilities for short-term, limited term or unit power sales." (See Appalachian Power Testimony of T. J. Nagel, West Virginia P.S.C. Case No. 8182, Applicant's Exhibit "U"). Mr. Nagel has testified that the construction project which is an issue in the case

at bar is not being constructed to serve the ECAR group and interconnected non-ECAR electric utilities such as TVA, Carolina Power and Light, Duke Power, Commonwealth Edison, Illinois Power, Central Illinois Public Service Company.

The entire cost of Appalachian's construction program will be borne by West Virginia and Virginia retail customers and firm wholesale customers. Other than those customers, none of the other entities mentioned by the Appellant will contribute fairly to the cost of the construction program during the construction period. Only after the construction is completed and those "non-firm" customers are receiving additional power will said other customers begin providing compensatory revenues to Appalachian Power Company in recognition of the cost of newly constructed facilities.

Further, it is submitted that the Appellant's method of financing this construction project may not be the most efficient. For example, in another parent Power System, various member utilities will share on a pro rata basis the cost of construction and ownership of a plant which will provide electricity to many jurisdictions and thus reduce the financing burden in a given jurisdiction. The American Electric Power System has chosen another method of alternative construction of large increments of capacity by member utilities. During the construction period the member responsible for such construction is faced with supporting the capital costs during an interim period without a sharing of such costs with other members of the system. The West Virginia Public Service Commission's sole concern by law is with the protection of the West Virginia retail customers and the West Virginia utilities. This Commission seeks in the orders of this case as well as others to render equitable and just rate orders that will be fair to the consumers of this State of West

Virginia as well as to utilities such as the applicant engaged in providing electric service in West Virginia.

Moreover, as has been previously discussed, the Appellant obviously has not done all it could to improve its financial situation. For example, Appalachian Power Company has invested approximately $90,000,000 in subsidiary companies principally involved in coal mine operations. Would not Appalachian's needs for external financing of production facilities be reduced through its own initiative by selling a portion or portions of this coal property? If a choice must be made between needed capacity for generating electricty and investments in coal reserves, the time may have come for Appalachian to reassess its part in such and leave coal mining to coal mining companies.

The Appellant further contends that the Commission orders impose a burden on and interfere with interstate commerce by prescribing rates so low so that timely completion of the Company's construction of its portion of the planned AEP systemwide construction program is imperiled. The Appellee contends that the Appellant is premature in its contention. The completion date of the construction project is 1981 and needed financing is required in 1978, 1979, 1980, and 1981. The rate orders in the case at bar are applicable to a period substantially prior to those dates. The Commission cannot be required to render rate orders which will infinitely solve or remedy all problems. There are too many variables which will affect rates between now and 1981. Moreover, in addition to Appalachian doing what it can through prudent management decisions to improve its financial status, the Appellant also has the opportunity to seek new rates through new rate cases. The case of the *Federal Power Commission* v. *Hope Natural Gas*, 320 U.S. 591, 615 (1944), is cited for that proposition. The United States

BEST COPY AVAILABLE

Supreme Court, as quoted heretofore in this Brief, held as follows:

> "... It is suggested that the Commission has failed to perform its duty under the Act in that it has not allowed a return for gas production that will be enough to induce private enterprises to perform completely and efficiently its functions for the public. The Commission, however, was not oblivious of those matters. It considered them ... No serious attempt has been made here to show that they are inadequate. We certainly cannot say that they are, unless we are to substitute our opinions for the expert judgment of the administrators to whom Congress entrusted this decision. Moreover, if in light of experience they turn out to be inadequate for development of new sources of supply, the doors of the Commission are open for increased allowances. This is not an order for all time. The Act contains machinery for any adjustments..."

It is again pointed out to this Honorable Court that the Appellant has pending with this Commission a *new* rate filing, Case No. 9091, filed September 12, 1977.

Appellant has further alleged that the Commission orders impose an impermissible burden on and interference with interstate commerce by prescribing rates so low that timely completion of the Company's construction of its portion of the planned AEP systemwide construction program is imperiled. The Appellant then cites the case of *Southern Pacific Company* v. *Arizona*, 325 U.S. 761 (1944) for the proposition that the Commission has overstepped the bounds of reasonableness and that the Court as a final arbiter must engage in appraisal and accommodation of the competing demands of the state and national interests involved. The Appellant goes on to state that the Commission's orders impose a serious burden on interstate commerce conducted by the Appel-

ant and proposes a substantial obstruction to the national policy proclaimed by Congress of assuring an abundant supply of electric energy to the United States with the greatest possible economy and with regard to the proper utilization and conservation of natural resources.

The Appellant is attempting to raise a "national interest issue" which does not exist. It is submitted that the *Southern* case can be distinguished from the case at bar on the basis that the national commerce that the Appellant is alluding to in its jurisdictional statement is futuristic. There is nothing in the record to indicate that the Appellant's ability to transmit electricity on an interstate basis will at all be affected in the year 1978 nor any of the prior periods of 1975 and 1976 that Case No. 8182 concerns. To raise the national interest issue at this point in the proceeding is totally without merit.

The national commerce spoken of in the *Southern* case is one that is real and demonstrative. The commerce that Appalachian alleges will be affected by the Commission's rate orders is futuristic and speculative at best. On page 767 of *325 U.S.* (the *Southern* case), the court stated as follows:

> "... When the regulation of matters of local concern is local in character and effect, and its impact on the national commerce does not seriously interfere with its operation, and the consequent incentive to deal with them nationally is slight, such regulation has been generally held to be within state authority..."

The Court stated further on page 770 of *325 U.S.* the following:

> "... There has thus been left to the states wide scope for the regulation of matters of local state concern, even though it in some measure affects the

commerce, provided it does not merely materially restrict the free flow of commerce across the state lines, or interfere with it in matters with respect to which uniformity of regulation is of predominant national concern . . ."

In conclusion, it is submitted that the commerce in this case at bar is one of a local nature and affects intrastate commerce only. There is absolutely nothing in the record of these proceedings to demonstrate that the flow of interstate commerce will in any way be impeded. Further, the Appellant's attempt to raise the national commerce issue is futuristic and has no application to Case No. 8182.

It is therefore concluded and respectfully submitted that the Commission orders in question do *not* unconstitutionally burden or interfere with interstate commerce.

ARGUMENT — SUMMARY

The Commission orders in question establish rates for Appalachian for the period from August 28, 1975 through April 30, 1977.

Appalachian while contending ex post facto confiscation did issue first mortgage bonds three times in *1975* and twice in *1976*. Its coverage on December 31, 1976 exceeded 2.0 times.

Appalachian plans to again issue First Mortgage Bonds in late 1978. Its increased rates by the West Virginia Commission effective May 1, 1977; by the Federal Power Commission effective July 1, 1977; and by the Virginia Corporation Commission effective November 1, 1977; should establish its coverage ratio well in excess of any indenture "requirement" of 2.0 times.

Especially when, as demonstrated above, exclusion of non-approved accelerated depreciation expense ($1.4

Million), and inclusion of subsidiary earnings ($5 Million) is effected, the Company's coverage exceeds 2.0 times even as of August 31, 1977.

More importantly, the imposition of *new* rates in West Virginia, effective March 1978, in the amount of at least $47,000,000 over and above approved West Virginia rates would, according to the company, permit it to issue the First Mortgage Bonds in late 1978. (This is subject to future Commission consideration).

As of a given time, there has never been an issue.

There is *no* unlawful confiscation which has deprived Appalachian of property without just compensation. The rates established are well within the zone of reasonableness. There is no violation of the requirements of the Fifth and Fourteenth Amendments of the United States Constitution.

Additionally, there is no violation of Article I, Section 8, Clause 3 of the United States Constitution, relating to the power of Congress to regulate commerce among the states.

First: There is *no* commerce regulated by Congress to be interfered with. *Second:* Local public utility ratemaking is not *per se* interference with interstate commerce. *Third:* The *confiscation* that Appalachian says "interferes" does not exist. *Fourth:* The "commerce" that Appalachian fears will be interfered with is futuristic (1981 and beyond) and vague and specious, just as is the issue raised with respect to interference with interstate commerce.

In closing, the company raises the problem of the "energy crisis" and in so doing adroitly island-hops over the constitutional issues, which do not readily bend to a decision for the company, to the national policy of the

Chief Executive and of Congress, and quotes the President from the New York Times regarding "the moral equivalent of war".

While the President has identified and characterized the energy crisis as the moral equivalent of war, such characterization certainly was not meant to give the electric utility industry a license to use, without recompense, the monies of the consuming public gathered now to build its plants in the future.

As stated above, the net effect of this appeal so far has been to delay the October 1977 refund, a refund of rates paid by West Virginia ratepayers in excess of rates found to be reasonable and just by the only administrative body which, by law, may establish rates in West Virginia. These refunds belong to the ratepayers. If any confiscation has occurred, it is by the company of the ratepayers' monies.

For the foregoing reasons, it is respectfully moved that the appeal be dismissed.

CONCLUSION

For all of the foregoing reasons the appellee, Public Service Commission of West Virginia, respectfully moves that the appeal herein be dismissed and that the order of the West Virginia Supreme Court of Appeals of October 10, 1977, affirming Commission orders of May 6, 1977, and July 29, 1977, in Commission Case No. 8182, upon the matter of Increased Rates and Charges of Appalachian Power Company in West Virginia, be affirmed; and that said Motion be granted on the grounds that no substantial federal questions have been presented.

Respectfully submitted,

Arnold O. Weiford
Clement R. Bassett
George Zivkovich
C. Terry Owen
Attorneys for Appellee

Public Service Commission of West Virginia
E-214 State Capitol Building
Charleston, West Virginia 25305

February 8, 1977